86-333

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JIM BARBER, DAVID TARTER, and RAYMOND BRADLEY,
Petitioners,

vs.

AMERICAN AIRLINES, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals
For the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a plaintiff in an ADEA reduction-in-force case need only demonstrate as part of his prima facie case that the employer favored younger employees, or whether the plaintiff is required to demonstrate that the favored employees were outside the protected age group.

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VS.

AMERICAN AIRLINES, INC.,
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On Writ of Certiorari to the United States Court of Appeals
For the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The judgment of the district court entered on the jury verdict, dated December 31, 1984, and the Memorandum Opinion and Order of the district court, dated March 18, 1985, are set out in the Appendix hereto at pages A-1 and A-5. The opinion of the United States Court of Appeals for the Eighth Circuit, reversing the decision of the district court, entered on May 28, 1986, and the supplemental decision denying the petitioners' petition for rehearing en banc, are also set out in the appendix at pages A-8 and A-14. The opinion of the United States Court of Appeals for the Eighth Circuit has recently been reported as *Barber v. American Airlines, Inc.*, 791 F.2d 658 (8th Cir. 1986).

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1). On May 28, 1986, the United States Court of Appeals for the Eighth Circuit entered an order reversing the judgment of the district court on a jury verdict for all three plaintiffs. On June 10, 1986, plaintiffs petitioned for rehearing, which petition was denied on July 3, 1986, without a supplemental opinion.

STATUTORY PROVISIONS INVOLVED

The Age Discrimination in Employment Act (ADEA) of 1967, 29 U.S.C. §§621, *et. seq.*, provides, in pertinent part:

> Section 4 [29 U.S.C. §623] (a) It shall be unlawful for an employer...(1) to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.
>
> Section 12, 29 U.S.C. §631(a) provides:
>
> The prohibitions in this Act shall be limited to individuals who are at least 40 years of age but less than 70 years of age.

STATEMENT OF THE CASE

Petitioners Barber, Bradley, and Tarter were employed for several years as operations agents (in the operations function) at the American Airlines, Inc., facility in Little Rock, Arkansas. The operations agents were responsible for aircraft load and control functions. In early January, 1983, all three petitioners received notification that they were being "surplused" due to a reduction-in-force. The reduction encompassed a phasing-out of operations functions in twenty-one (21) cities in the Southern Region (including Little Rock) and a consolidation of those functions at the Dallas-Ft. Worth (DFW) facility.

Petitioners were presented with four options they could choose from in preparation for the reduction-in-force, including early retirement, lay-off with recall rights, and transfer to DFW. Two of the petitioners, Barber and Bradley, who were ages fifty-one (51) and fifty-eight (58), respectively, ultimately elected early retirement. Tarter, aged forty-nine (49), was not eligible for early retirement under company regulations and he ultimately elected to transfer to the Reservations function at the DFW facility.

Before they were terminated, petitioners repeatedly requested that company officials give them the opportunity, available to employees under company regulations and past practice, to displace or "bump" less senior full-time ticket agents in the Little Rock facility. These requests prompted American Airlines to offer petitioners part-time ticket agent positions in Little Rock. However, petitioners were never permitted to displace any full-time employees or to utilize the "shift-splitting" mechanism (combining two part-time positions into a full-time position) in order to remain employed at the Little Rock facility. Barber and Bradley were terminated by March, 1983, and petitioner Tarter was transferred to the DFW facility. At the time of the reduction-in-force, the three petitioners had accumulated a total of eighty-five (85) years seniority, and eighteen weeks of annual vacation benefits, and were receiving the maximum salaries for operations agents employed by American. As of March, 1983, three full-time agents remained in the Little Rock facility ranging in age from forty-five (45) to forty-eight (48) and eight part-time agents were retained, the majority of them in their twenties.

On June 27, 1983, petitioners filed their complaint for age discrimination under the Age Discrimination in Employment Act (ADEA) in the Eastern District of Arkansas, Western Division.

The Court exercised jurisdiction over the case pursuant to 28 U.S.C. §1343(a)(4) and 29 U.S.C. §621, *et. seq.* Trial was com-

menced to a jury on October 15, 1984, the Honorable Garnett Thomas Eisele presiding. The jury rendered verdicts in favor of all three petitioners and the district court entered judgment on the jury verdicts on December 31, 1984. On March 18, 1985, the district court filed a Memorandum and Order denying the respondent's Motion for Judgment Notwithstanding the Verdict and Motion for New Trial. A-5.

The respondent appealed on April 15, 1985, to the United States Court of Appeals for the Eighth Circuit. On May 28, 1986, the Court reversed the judgment for petitioners, holding that there was insufficient evidence to create a jury issue of age discrimination. On June 10, 1986, petitioners filed a petition for rehearing, which was denied on July 3, 1986, without supplemental opinion. A-14.

In discussing the petitioners' evidence regarding age discrimination, the Court of Appeals stated that petitioners' theory that evidence of a similar reduction-in-force situation in 1981 at the Little Rock facility, when older employees had been allowed to invoke company regulations to displace younger employees, contained the "seeds of its own refutation" because the employees in the 1981 incident who were allegedly "favored" "were also within the protected age group.[1] The Court of Appeals also stated that the petitioners' evidence of age discrimination was not convincing because those ticket agents whom petitioners wished to displace during the 1983

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[1] The evidence of the 1981 reduction-in-force and the "bumping" incident which followed it was presented by petitioners for two purposes: First, to prove the "qualification" prong of the *prima facie* case; second, to demonstrate that, on at least one occasion, American Airlines had interpreted its regulations in a non-discriminatory manner, by allowing the older, more senior employees at the Little Rock station to train so that they could "bump" younger employees to other locations, and remain in Little Rock after the reduction-in-force. In their Petition for Rehearing, petitioners argued that the Eighth Circuit panel misconstrued this evidence.

reduction-in-force were "in the same general age bracket" as petitioners and "not a single one of them was outside the protected age group."

ARGUMENT

This Court should grant petitioners' petition for certiorari and review the decision by the Eighth Circuit for two reasons: (a) the Eighth Circuit Court of Appeals has rendered a decision which directly conflicts with decisions on the same issue by the Fifth, Sixth, and District of Columbia Circuits; and (b) there is a discernable split in the circuits regarding the nature of proof required to make a prima facie ADEA case in a reduction-in-force context, an important issue regarding the interpretation of the ADEA, which should be resolved by this Court. While the Eighth Circuit, in reversing the district court's judgment on the jury verdict, held that there was insufficient evidence in the record to create a jury question of age discrimination, the actual cornerstone of the Court's decision was the legal premise that in a reduction-in-force context the plaintiff must demonstrate that the employer favored employees who were *outside the protected age group* (under age 40) to raise the inference of age discrimination.[2]

The Eighth Circuit's position directly conflicts with decisions by four circuits which have expressly defined the elements necessary to prove a prima facie ADEA case in a reduction-in-force context. *Williams v. General Motors Corp.*, 656 F.2d 120 (5th Cir. 1981); *Thornbrough v. Columbus & Greenville R. Co.*, 760 F.2d 633 (5th Cir. 1985); *LaGrant v. Gulf & Western Mfg. Co., Inc.*, 748 F.2d 1087 (6th Cir. 1984); *Coburn v. Pan American World Airways, Inc.*, 711 F.2d 339 (D.C. Cir. 1983);

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[2] The crucial passage from the opinion of the Eighth Circuit is the following:

> But again, no inference of age discrimination can rationally be drawn, because the employees whom American chose to retain in Little Rock...were also in the same general age bracket as plaintiffs. Not a single one of them was outside the protected age group... Pet. App.

Maxfield v. Sinclair International, 766 F.2d 788 (3rd Cir. 1985).[3]

In *Williams, supra,* the Fifth Circuit modified and refined the guidelines established by this Court in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), with regard to proof of age discrimination in reduction-in-force cases.[4] *Williams* holds that employees may establish a prima facie case by adducing circumstantial evidence that younger employees were more favorably treated than older employees. That test has been repeatedly refined and affirmed by more recent Fifth Circuit decisions, including *Thornbrough, supra,* where the Fifth Circuit succinctly stated:

> In a reduction-in-force case, what creates the presumption of discrimination is not the discharge itself, but rather the discharge coupled with the retention of younger employees.

760 F.2d at 644.

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[3] In non-reduction-in-force cases, the First and Eleventh Circuits have taken the position that the ADEA prima facie case turns on a comparison with *younger* employees. *See, Loeb v. Textron, Inc.,* 600 F.2d 1003 (1st Cir. 1979); and *Goldstein v. Manhattan Industries, Inc.,* 758 F.2d 1435 (11th Cir. 1985), and the First Circuit's decision in *Loeb* was cited by this Court with approval in *TransWorld Airlines v. Thurston,* ____ U.S. ____, ____, 105 S.Ct. 613, 621, 83 L.Ed.2d 523 (1985).

[4] The plaintiff in an ADEA under *McDonnell Douglas* and *Burdine* has the initial burden of adducing evidence that creates an "inference that an employment decision was based on a discriminatory criterion illegal under the Act." *International Brotherhood of Teamsters v. United States,* 431 U.S. 324 (1977) (construing Title VII, 42 U.S.C. §2000e, *et. seq.*). Since in a reduction-in-force context the presumption of age discrimination is not raised by the mere termination of older employees, the focus is on the younger employees who are retained.

That conclusion is fully consistent with the approach taken by the District of Columbia Circuit in *Coburn,*[5] *supra,* where the Court held that in a reduction-in-force suit, an employee can establish a prima facie case merely by proving that, while he was fired from a job for which he was qualified, "*Younger* persons were retained and others later promoted." 711 F.2d at 343. (Emphasis supplied).

The Sixth Circuit in *LaGrant, supra,* utilized this same formulation of the elements of the prima facie ADEA case in company-wide reorganization cases and cited the Fifth Circuit's decision in *Williams* with approval. *LaGrant* held that an ADEA prima facie case requires proof, either direct, circumstantial, or statistical, that age was a determining factor in the plaintiffs' termination. 748 F.2d at 1091; *Williams, supra,* at 129. The analysis in *LaGrant* makes it quite clear that such proof involves a comparison of treatment with all younger employees, not only those outside the protected age group.

The Fifth Circuit decision of *McCorstin v. United States Steep Corp.,* 621 F.2d 749, 754 (5th Cir. 1980), articulates the rationale for the rule adopted by that circuit:

> [B]ecause the discrimination involves age, rather than sex or race, a requirement that the replacement be from a non-protected group fails to take the reality of the working place into account. Because of the value of experience, rarely are sixty-year olds replaced by those under forty. The replacement process is more subtle but just as injurious to the worker who has been discharged...

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[5] The *Coburn* court stated that an inference of discrimination is created if the plaintiff shows that he (1) belongs to the statutorily-protected age group (40-70), (2) was qualified for the position, (3) was terminated, and (4) was disadvantaged in favor of a *younger* person. *See, Cuddy v. Carmen,* 694 F.2d 853, 857 (D.C. Cir. 1982).

Similarly, the Third Circuit, in *Maxfield,*[6] *supra,* stated:

> If no intra-age group protection were provided by the ADEA, it would be of virtually no use to persons at the upper ages of the protected class whose jobs require experience since even an employee with clear anti-age animus would rarely replace them with someone under 40.

766 F.2d at 792.

Contrary to the rationale supporting the decisions of these circuits, the decision of the Eighth Circuit exacts a comparison with employees who are under the age of forty, a standard which is inconsistent with the legislative purpose of the ADEA, and the purpose of this Court's *McDonnell Douglas* test as it was later refined by *Furnco Const. Corp. v. Waters,* 438 U.S. 567 (1978); *Board of Trustees v. Sweeney,* 439 U.S. 24 (1978); and *Texas Department of Community Affairs v. Burdine,* 450 U.S. 249 (1981). Although the Eighth Circuit does not hold as such, the opinion in the instant case is based on this legal position. Twice in its opinion, the Eighth Circuit notes that its conclusion of insufficient evidence depends on petitioners' failure to present their case as a comparison between employees inside and outside the protected age group.

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[6] In *Maxfield,* the Third Circuit clarified language in two earlier decisions, *Massarsky v. General Motors Corp.,* 706 F.2d 111 (3rd Cir.), *cert. denied,* ____ U.S. ____, 104 S.Ct. 348 (1983), and *Duffy v. Wheeling Pittsburgh Steel Corp.,* 738 F.2d 1393, 1395 (3rd Cir.), *cert. denied,* ____ U.S. ____, 105 S.Ct. 592 (1984), that a plaintiff "need show only that he is a member of the protected class and that he was laid off from a job for which he was qualified while others not in the protected class were treated more favorably." The Court stated that in both cases the "favored" employees were under 40, but in both, the Court emphasized elsewhere that a prima facie case could be made by showing replacement by a younger employee. *Massarsky,* 706 F.2d at 118 n.13; *Duffy,* 738 F.2d at 1395, n.2.

The decision of the Eighth Circuit is arguably supported by decisions of the Fourth Circuit in *EEOC v. Western Electric Co.*, 713 F.2d 1011 (4th Cir. 1983), and the Seventh Circuit in *Trembath v. St. Regis Paper Co.*, 753 F.2d 603 (7th Cir. 1985) (non-reduction-in-force), and *Tice v. Lampert Yards, Inc.*, 761 F.2d 1210 (7th Cir. 1985) (reduction-in-force).[7] In *Western Electric*, the Fourth Circuit concluded that the district court had erred as a matter of law in failing to require the plaintiff EEOC to prove in its prima facie case that there was favored treatment of "persons outside the protected age class," or other evidence that age was not treated neutrally by the employer. 713 F.2d at 1015.

Thus, there is a real and substantial conflict in the circuits with regard to the proof required of a plaintiff in an ADEA reduction-in-force case. The federal question is significant and involves an interpretation of the federal statute which must be resolved now by this Court. *Shapiro v. United States*, 235 U.S. 412 (1914).

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[7] This decision also contravenes two earlier Eighth Circuit decisions under the ADEA, *Tribble v. Westinghouse Elec. Corp.*, 669 F.2d 1193 (8th Cir. 1982), *cert. denied*, 460 U.S. 1080 (1983); and *Cova v. Coca-Cola Bottling Co.*, 574 F.2d 958 (8th Cir. 1978). Both cases held that proof that younger persons were favored by the employer met the fourth prong of the *McDonnell Douglas* test, although neither case involved a reduction-in-force.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari to the Eighth Circuit Court of Appeals should be granted. The Eighth Circuit's decision is in conflict with decisions in at least four circuits, and a genuine split in the circuits exists on a significant federal issue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Philip E. Kaplan, hereby certify that a copy of the above and foregoing document has been mailed on this 21st day of August, 1986, to:

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Philip E. Kaplan

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

No. LR-C-83-552

Jim Barber, Raymond Bradley, and David Tarter
Plaintiffs

v.

American Airlines, Inc.
Defendant

JUDGMENT

Filed Dec. 31, 1984

On October 18, 1984, the jury returned verdicts as follows: in favor of Jim Barber on his complaint of age discrimination, assessing his actual damages at $45,000; in favor of Raymond Bradley on his complaint of age discrimination, assessing his actual damages at $45,000; and in favor of David Tarter on his complaint of age discrimination.

Issues involving liquidated damages were submitted to the jury, with respect to plaintiffs Barber and Bradley. No issue on liquidated damages was submitted to the jury with respect to plaintiff Tarter, inasmuch as he was not, and is not, entitled to back pay. As to Mr. Barber and Mr. Bradley, the jury refused to award liquidated damages or to find that American's conduct was willful. Accordingly, the plaintiffs' claims for liquidated damages are dismissed with prejudice.

Based upon the jury verdict, the Court concludes that Jim Barber and Raymond Bradley are entitled to the injunctive relief of reinstatement as employees of American Airlines and are to be hired as full-time ticket agents at the American Airlines' Lit-

tle Rock station. Mr. David Tarter is entitled to injunctive relief requiring defendant to place and assign him as a full-time ticket agent at the American Airlines' Little Rock station. Upon reinstatement, plaintiffs Barber and Bradley will be entitled to all the rights, privileges and benefits of other similarly positioned full-time employees, with those rights, privileges and benefits restored as if they had never "retired"; and plaintiff Tarter shall be entitled to placement as a full-time ticket agent in Little Rock with full and consistent rights and privileges.

The Court agrees with defendant that the retirement benefits that plaintiffs Barber and Bradley have received must be returned to the defendant. Accordingly, Mr. Bradley, who was paid a lump sum distribution upon retirement, must return that sum, without interest, to the American Airlines' retirement program, less the amount by which that distribution was reduced by federal income taxes paid on it by Mr. Bradley. Mr. Bradley must then seek immediate refund of those taxes paid and upon receipt of that refund, pay it to the American Airlines retirement program, which will result in a return by Mr. Bradley of the total lump sum retirement distribution that he received. Such sums, when repaid, will be credited to Mr. Bradley's American Airlines retirement program. As to Mr. Barber, he must return to the American Airlines retirement program the total of the monthly retirement benefits that he has received from that program. Accordingly, the actual damages of $45,000 awarded by the jury to Mr. Barber will be reduced by that sum, which repayment will then be credited to Mr. Barber's American Airlines retirement program.

The Court also agrees with defendant's contention that the amounts earned by Mr. Bradley since his "retirement," to wit: the sum of $2,007, must be deducted from the jury award in his favor. The Court will itself deduct this sum from the $45,000 jury award in the judgment granted below.

The Court agrees with plaintiff Tarter that the defendant is not entitled to the reimbursement of any portion of the $12,500

bonus or moving allowance which was paid to Mr. Tarter upon his move to Texas.

Finally, the Court concludes that an award of a reasonable attorney's fee to the plaintiffs as prevailing parties is proper, and reserves the right to rule on the specific amount thereof at a later date if the parties are not able to reach an agreement thereon.

It is therefore Ordered that the plaintiff, Mr. Jim Barber, have judgment against the defendant in the amount of $45,000.

It is further Ordered that the plaintiff, Mr. Raymond Bradley, have judgment against the defendant in the amount of $42,993.

It is further Ordered that the defendant reinstate the plaintiffs, Mr. Jim Barber and Mr. Raymond Bradley, as its employees and that they be assigned positions as full-time ticket agents at defendant's Little Rock station, possessing all the rights, privileges and benefits of similarly-situated full-time employees, with those rights, privileges and benefits restored as if they had never been "retired."

It is further Ordered that the plaintiffs, Mr. Barber and Mr. Bradley, are entitled to pay, in the amounts they would have received had they not been "retired," from and after the date of the jury's verdict herein until the date they are actually reinstated pursuant hereto.

It is further Ordered that the defendant place the plaintiff, Mr. David Tarter, in a position as full-time ticket agent at its Little Rock station with all of the rights and privileges pertaining to such position.

It is further Ordered that the plaintiffs, Mr. Barber and Mr. Bradley, reimburse defendant for the retirement payments they have received in accordance with this order and judgment.

It is further Ordered that plaintiffs have their costs expended.

It is further Ordered that the case be, and it is hereby, dismissed.

Dated this 31st day of December, 1984.

/s/ Garnett Thomas Eisele
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

No. LR-C-83-552

Jim Barber, Raymond Bradley and David Tarter
Plaintiffs

v.

American Airlines, Inc.
Defendant

MEMORANDUM AND ORDER

Filed March 18, 1985

Pending before the Court are five motions filed pursuant to the entry of judgment on December 31, 1984. In this Order, the Court will address each of the motions.

On January 7, 1985, defendant filed a "Motion for Judgment Notwithstanding the Verdict and in The Alternative Motion for New Trial." The Court has examined these two motions carefully and concludes that they must be denied. The grounds for the motions are generally that the evidence was insufficient to support the jury's verdict and that the Court erred in its rulings on questions of law, particularly in relation to many of the jury instructions. The Court, after reviewing the record, concludes that the evidence was sufficient to support the verdict and that the instructions given were proper.

Turning to the defendant's "Motion to Amend Judgment," the Court first expresses the view that most of the issues raised amount to little more than carping and could easily have been worked out among the parties in view of the language of the judgment entered on December 31, 1984. The defendant states

that the judgment should be amended to reduce Mr. Barber's recovery by $8,750.07, the amount of retirement benefits he has received. The Court's judgment stated that Mr. Barber and Mr. Bradley would have to return the retirement benefits. It states:

> As to Mr. Barber, he must return to the American Airlines retirement program the total of the monthly retirement benefits that he has received from that program. Accordingly, the actual damages of $45,000 awarded by the jury to Mr. Barber will be reduced by that sum, which repayment will then be credited to Mr. Barber's American Airlines retirement program.

Therefore, according to the judgment, the defendant must pay $8,750.07 to Mr. Barber's retirement program and, when it evidences that it has done so, it may reduce the actual damages to be paid to Mr. Barber by said sum.

The Court will not condition Mr. Bradley's reinstatement upon his returning all of the retirement benefits he has received, but the Court is directing Mr. Bradley to make arrangements which will insure that the retirement benefits paid to him are returned to the defendant, without interest, no later than 30 days after receipt by Mr. Bradley of the amount of $42,993 awarded to him in the original judgment. The Court denies all other requests for relief included in defendant's motion to amend judgment.

Finally, the Court will take up plaintiff David Tartar's motion for further relief pursuant to F.R.C.P. 62(c).

In the judgment entered herein on December 31, 1984, it was ordered that:

> the defendant place the plaintiff, Mr. David Tartar, in a position as full-time ticket agent at its Little Rock Station with all of the rights and privileges pertaining to such position.

On January 15, 1985, defendant filed a supersedeas bond to stay the payment of certain backpay awards to the other plaintiffs and the payment of certain costs. The bond does not in any way stay the injunctive relief granted in the December 31, 1984 judgment. The Court is this day approving the supersedeas bond upon that understanding.

The Court has considered the plaintiffs' motion for further relief and the defendant's response and the plaintiff's reply thereto, from all of which it concludes there is no stay of the Court's order in favor of Mr. Tartar and that the defendant should therefore comply with the Court's judgment of December 31, 1984, no later than April 10, 1985.

Dated this 18th day of March, 1985.

/s/ Garnett Thomas Eisele
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 85-1507

Jim Barber, David Tarter, and Raymond Bradley,
Appellees,

v.

American Airlines, Inc.,
Appellant.

On Appeal from the United States District Court
for the Eastern District of Arkansas.

Submitted: November 11, 1985

Filed: May 28, 1986

Before ARNOLD and WOLLMAN, Circuit Judges, and REGAN,* Senior District Judge.

ARNOLD, Circuit Judge.

This is an action under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§621 et seq. The jury returned a verdict for all three plaintiffs. From the judgment entered on

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* The Hon. John K. Regan, Senior United States District Judge for the Eastern District of Missouri, sitting by designation.

this verdict, the defendant appeals. We hold that there was insufficient evidence to make a jury question of age discrimination and therefore reverse.

We state the facts in the light most favorable to plaintiffs, who won the verdict. On January 5, 1983, the defendant, American Airlines, Inc., notified the three plaintiffs, Jim Barber, David G. Tarter, and Raymond Bradley, that it had decided to transfer some of its operations from Little Rock to the Dallas-Fort Worth Airport. This change, which defendant characterized as a consolidation of "operations" functions for its southern region, meant that the jobs plaintiffs had been performing, or at any rate a substantial portion of the duties of those jobs, would no longer exist in Little Rock. Barber, who was 51 at the time, and Bradley, who was 58, were given a choice between taking early retirement and moving to Dallas, where they would be given jobs equal in pay and benefits to their Little Rock positions. Tarter, who was only 49, was not eligible for early retirement, and he was told simply that he would have to move to Dallas if he wished to continue full-time employment with the defendant. Faced with this choice, Barber and Bradley took early retirement, and Tarter moved to Dallas, where, at least as of the time of the trial, he still worked for American. All three plaintiffs then brought this action, claiming that their employer's decision to confront them with the choice described was based at least in part on their age, and was therefore a violation of the ADEA, which provides, in general, that employers may not discriminate against employees between the ages of 40 and 70 on account of age.

As the case was put to the jury by the District Court - and neither party now complains of any error in the jury instructions - plaintiffs' contentions were summarized as follows. In their view, they should have been permitted to "bump" other, less senior employees who were working on the ticket counter in Little Rock, instead of being forced either to retire early or go to Dallas. American's reply to this claim is simply that under its

personnel practices in effect at the time, no employee could exercise his "bumping" rights under the seniority system unless he was qualified to perform the job into which he wished to "bump," or could become qualified within five days. In American's view, the three plaintiffs were not sufficiently proficient in the computerized business of issuing tickets to justify allowing them to displace full-time ticket agents already on the job. Plaintiffs say that they were sufficently qualified, and that American refused to allow them to "bump" because of their age. In the alternative, plaintiffs claim that they could have become sufficiently qualified, through study or on-the-job training, if they had been given more advance notice of American's plan to consolidate functions at the Dallas-Fort Worth Airport. When plaintiffs got notice of the planned consolidation on January 5, 1983, they were given only three days to make up their minds whether to retire or move to Dallas. Other employees in the past, plaintiffs argued, had been given more time to prepare for such a situation and had been permitted to educate themselves sufficiently to "bump" ticket agents even though they were no more qualified to perform ticket-agent functions than plaintiffs.

In this appeal from a jury verdict, we are concerned primarily with the simple question whether the record contains enough evidence to justify a rational jury in finding that age was a determining factor in what happened to plaintiffs, a factor in the absence of which the employer would not have taken the adverse action it did. See *United States Postal Service Board of Governors v. Aikens,* 460 U.S. 711, 714-15 (1983); *Gilkerson v. Toastmaster, Inc.,* 770 F.2d 133, 135 (8th Cir. 1985). The three-stage order of proof and the presumptions described in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973) (claim of racial discrimination under Title VII), an analytical scheme which is applied also in age-discrimination cases, is useful to the court in structuring the proof while the trial is in progress, and, in cases tried to the court without a jury, as a framework against which the court can view the evidence in making its findings.

But once a finding of discrimination *vel non* has been made, and the resulting judgment is being evaluated on appeal, these presumptions fade away, and the appellate court should simply study the record with a view to determining whether the evidence is sufficient to support whatever finding was made at trial. This is the teaching of *Aikens, supra.*

Here, plaintiffs are members of the protected age group, and the employer did take adverse action against them. The employer's asserted reason for not permitting them to "bump" is that they were not qualified to do so under its personnel regulations. To this plaintiffs reply that these regulations have not been uniformly applied, and that other employees no more skilled than they were permitted to remain in Little Rock in the past in a similar situation. In general, if the employer's asserted nondiscriminatory reason for taking the action of which a plaintiff complains can be shown not to be the true reason, or not to have been consistently applied in the past, an inference of discrimination can rationally be drawn by the trier of fact. See, *e.g., Dace v. ACF Industries, Inc.,* 722 F.2d 374, 378-79 (8th Cir. 1983), *modified per curiam,* 728 F.2d 976 (8th Cir. 1984). But here, plaintiffs' theory - that others were permitted to "bump" in the past in a similar situation - contains the seeds of its own refutation. For the other employees who were allegedly given the privilege that plaintiffs now claim were also within the protected age group and, in fact, were reasonably close in age to the plaintiffs themselves.[1] In these unusual circumstances, an inference of age discrimination is plainly impermissible. For even if plaintiffs were unfairly treated, and even if others were unjustly favored in the past, no inference of age discrimination can be drawn, for the simple reason that the employees who were allegedly given preferential treatment were not "young." They were in the same age group as plaintiffs. If any kind of discrimination is operating here, therefore, it is not age discrimination, and that is all this case is about.

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[1] The ages of the allegedly favored employees ranged from 46 to 54.

Similarly, we can accept plaintiffs' position that the evidence was sufficient to persuade a rational jury that they in fact were qualified to "bump" in 1983, and that, under American's personnel regulations, they ought to have been allowed to do so. But again, no inference of age discrimination can rationally be drawn, because the employees whom American chose to retain in Little Rock, the ticket agents whom plaintiffs wished to "bump," were also in the same general age bracket as plaintiffs.[2] Not a single one of them was outside the protected age group, and Jim Hicks, the person who would have been "bumped" first, was 48 years old, almost the same age as the plaintiff Tarter. The three ticket agents who were permitted to remain in Little Rock, to be sure, had somewhat less seniority with the company than the plaintiffs (combined seniority of 57 years as opposed to plaintiffs' combined seniority of 84 years), and seniority may in some circumstances be a proxy for age for purposes of evaluating age discrimination. Here, however, that reasoning will not work, because, as already noted, the employees whom plaintiffs wished to displace were substantially the same age as plaintiffs themselves.

In reviewing a judgment entered on the verdict of a jury, we are mindful that we must view the evidence in the light most favorable to the party winning the verdict, here plaintiffs, according them the benefit of every reasonable inference that can be drawn from the evidence, and setting aside the verdict only if the evidence points all one way. *Dace, supra,* 722 F.2d at 375-76. We have carefully read every page of the testimony at this trial, and we are persuaded that this stringent standard has been met. The jury could rationally have believed that plaintiffs ought in good conscience to have been permitted to stay in Little Rock, and that American had violated its own personnel practices in demanding their transfer, but there is absolutely no

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[2] The ages of these employees ranged from 45 to 48.

substantial evidence in this record that would justify attributing American's actions to plaintiffs' age.

We have considered *Thornbrough v. Columbus & Greenville R.R.*, 760 F.2d 633 (5th Cir. 1985), stressed by plaintiffs' counsel at the oral argument. In our opinion, the case does not stand for any proposition helpful to plaintiffs' position here. It states, for example, that "[i]n a reduction-in-force case, what creates the presumption of discrimination [created when plaintiff has made a prima facie case] is not the discharge itself but rather the discharge coupled with the retention of younger employees." *Id.* at 644. It is exactly this latter element -favoritism towards younger employees - that is missing here. See also *Bell v. Gas Serv. Co.*, 778 F.2d 512 (8th Cir. 1985); *Holley v. Sanyo Mfg., Inc.*, 771 F.2d 1161, 1163 (8th Cir. 1985) (judgment on jury verdict reversed in reduction-in-force situation even though plaintiff's position was "combined . . . with that of a younger man"). We add, in fairness to the District Court, that *Bell* and *Holley* were both decided after this cause was tried.

The judgment is reversed, and the cause remanded with directions to dismiss the complaint with prejudice.

A true copy.

Attest:

Clerk, U.S. Court Of Appeals, Eighth Circuit.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 85-1507-EA

Jim Barber, et al.,
Appellees,

v.

American Airlines, Inc.,
Appellant.

Appeal from the United States District Court
for the Eastern District of Arkansas

Appellees' petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

July 3, 1986

Supreme Court, U.S.
FILED
SEP 20 1986
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 86-333

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JIM BARBER, DAVID TARTER, and
RAYMOND BRADLEY,

Petitioners,

v.

AMERICAN AIRLINES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENT, AMERICAN AIRLINES INC., IN OPPOSITION TO PETITION

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26 pp

QUESTION PRESENTED

I. WHETHER THE RECORD BELOW CONTAINS LEGALLY INSUFFICIENT EVIDENCE TO SUSTAIN THE JURY'S FINDINGS IN FAVOR OF THE PETITIONERS ON THEIR CLAIMS OF AGE DISCRIMINATION?

LIST OF PARTIES

The Petitioners are Jim Barber, Raymond Bradley and David Tarter.

The Respondent is American Airlines, Inc. Affiliated entity: AMR Corporation (parent)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

NO. 86-333

JIM BARBER, DAVID TARTER, and
RAYMOND BRADLEY,

Petitioners,

v.

AMERICAN AIRLINES, INC.

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENT, AMERICAN AIRLINES, INC., IN OPPOSITION TO PETITION

Respondent, American Airlines, Inc. ("American") submits this brief in opposition to the petition for certiorari filed by Jim Barber, David Tarter, and Raymond Bradley ("petitioners").

STATEMENT OF THE CASE

American adopts the statement of the case as contained in the opinion of the Court below.

SUMMARY OF PETITION

The petitioners raise here one issue, which is not meritorious. The petitioners claim that the Eighth Circuit held, in the opinion below, that a plaintiff bringing suit under the Age Discrimination in Employment Act ("ADEA") of 1967, 29 U.S.C. § 621 *et. seq.* must demonstrate as part of his prima facie case in a reduction-in-force context that the employer favored employees outside of the protected age group; and the petitioners argue that the decision of the Eighth Circuit below is directly in conflict with the decisions of other Courts of Appeals on the same issue and that there is a discernible split amongst the circuits regarding the nature of proof required to prove a prima facie ADEA case in a reduction-in-force context.

SUMMARY OF ARGUMENT

The decision below is fully consistent with every relevant Court of Appeals decision addressing the issue presented, none of which involves an unsettled question of federal law. Accordingly, the petition fails to satisfy this Court's traditional criteria for review.

While the petitioners contend that the Eighth Circuit held that a plaintiff in an ADEA reduction-in-force case must demonstrate as part of his prima facie case that the employer favored employees outside the protected age group, even a cursory examination of the opinion below shows that was not the basis of the Eighth Circuit's decision in favor of American. The Eighth Circuit decided, rather, that there was simply no legally sufficient evidence to sustain the jury verdict in favor of the petitioners in the trial court, inasmuch as the petitioners own proof showed that the alleged favored employees were substantially the same age as the petitioners.

Further, the petitioners seemingly would have this Court adopt a standard by which a jury verdict for the plaintiffs in an

ADEA case arising out of a reduction-in-force would have to be sustained if the plaintiffs simply showed that they were affected by the reduction-in-force, that they were in the protected group, and that the allegedly favored employees were younger by any amount than the plaintiffs. An examination of the decisions of this Court, as well as the decisions of the Courts of Appeals, show that the quantum or type of proof necessary to prove a prima facie case in any given ADEA case will vary in accordance with differing factual situations with which a court is confronted.

The petitioners simply misperceive the focus of the holding of the Court below, which was not upon the standard of proof required for an ADEA plaintiff to prove a prima facie case of discrimination in a reduction-in-force case. The Court below simply focused, after reading "every page of the testimony at this trial," on whether the evidence was legally sufficient to support the jury's finding that the petitioners' age was the determining factor with reference to American's decision to not allow the petitioners to "bump" (i.e., displace) qualified ticket agents in Little Rock, Arkansas, at the time of the reduction-in-force.

REASONS FOR DENYING THE WRIT

The issue presented by the petitioners does not satisfy this Court's traditional criteria for certiorari. The Eighth Circuit Court's decision is fully consistent with every relevant Court of Appeals decision addressing the issues presented. Moreover, the issue does not involve an unsettled question of federal law.

The petitioners have seriously misconstrued, if not misstated, the holding of the Court below. In its opinion, the Eighth Circuit identifies two areas of proof adduced by the petitioners in the trial court in an attempt to show age discrimination. The first involves an episode in which the petitioners claim that American had permitted other employ-

ees, who they claim were no more skilled than the petitioners, to remain in Little Rock in the past in a similar reduction-in-force situation. *Barber, et al. v. American Airlines, Inc.,* 791 F.2d 658, 659-660 (8th Cir. 1986). The Eighth Circuit rejected this event as proof of age discrimination because the employees who were allegedly favored in the past by American were "reasonably close in age to the plaintiffs themselves." *Id.* at 660. The ages of the allegedly favored employees ranged from forty-six to fifty-four, while the ages of the petitioners were forty-nine, fifty-one and fifty-eight, at the time the petitioners claim American discriminated against them on account of their age. *Id.* at 659-660. Curiously, the petitioners now claim that they never intended this evidence as proof of age discrimination (petition for writ of certiorari, p. 4 n.1).[1]

Rather, for the first time, the petitioners now claim that they rely only upon one episode in the proof below to demonstrate age discrimination sufficiently to support the jury verdict, to-wit: the fact that the employees whom they would have bumped in 1983, had American permitted them to do so, were younger than the petitioners.[2] Specifically, the three ticket agents who were permitted to remain in Little Rock were forty-five to forty-eight years of age. *Barber, et al. v. American Airlines, Inc.,* 791 F.2d at 660. Moreover, as the Eighth Circuit observed, the employee who would have been "bumped" first was forty-eight years old, almost the same age as the petitioner

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[1] American would note in passing that this position is in complete conflict with that taken by the petitioners in the Court below. (Appellees' Brief, pp. 5-6, 10, 13, 18)

[2] It is quite telling that the Appellees failed to make a single reference to this evidence in the Court below. The Appellees' Brief is devoid of any mention of these agents or their ages, and the Appellees never advanced this evidence in the Court below or the trial court as being any proof whatsoever of age discrimination. Indeed, the Appellees failed to offer proof of the ages of these agents at trial; instead, American did so. (App. 429, 659, 666-667)

Tarter. *Id.*, at 660. The Eighth Circuit held that this evidence was not proof of age discrimination because "the employees whom plaintiffs wished to displace were substantially the same age as plaintiffs themselves." *Barber, et al. v. American Airlines, Inc.*, 791 F.2d at 660. The Eighth Circuit did not hold that it was incumbent upon the petitioners to prove that the alleged favored employees were outside the protected age group, in order to prove a prima facie case of discrimination, or in order to make out a fact issue for the jury. In fact, the petitioners cannot point to a single line or phrase in the opinion of the Eighth Circuit to substantiate their claim in this Court. Instead, the petitioners have quoted portions of the opinion of the Eighth Circuit out of context, in an apparent attempt to mislead this Court as to the holding of the Eighth Circuit. In sum, an examination of the decisions of this Court and of the other Courts of Appeals shows that the decision below is in harmony with those of this Court, the other Courts of Appeals, and with other Eighth Circuit decisions.

The petition in this case demonstrates a fundamental misunderstanding by the petitioners of this Court's opinion in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), inasmuch as the petitioners would have this Court adopt only one circumstance in which the fourth element of a prima facie case for discrimination in an age setting could be proven in a reduction-in-force context. (*McDonnell* involved a claim of racial discrimination under Title VII, but its analytical scope is applied also in age discrimination. *Holley v. Sanyo Mfg., Inc.* 771 F.2d 1161, 1164 (8th Cir. 1985)). In *McDonnell*, this Court noted:

> "The facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required

> from respondent is not necessarily applicable in every respect to differing factual situations." [3]

Id.. at 802.

Likewise, it has been held that *McDonnell* is not the alpha and omega of possible tests in the age discrimination context. *McCorstin v. U. S. Steel Corp.*, 621 F.2d 749, 753 (5th Cir. 1980). In fact, the petitioners have seriously misperceived the analytical approach taken by the Eighth Circuit in determining whether a plaintiff has produced the requisite quantum of proof to make out a prima facie case of age discrimination or to make

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[3] The prima facie evidence test announced in McDonnell consisted of the demonstration of four factual, objective elements: (i) that he [complainant] belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. It is the fourth prong of this test that has been varied by the appellate courts on a case-by-case basis in ADEA cases; and it is this fourth element that is raised as an issue herein by the petitioners. Thus, American will confine its argument to this element. The exact nature of this fourth component can vary from one age case to the next. For example, if the plaintiff has been replaced, he may show that his replacement was substantially younger. *Maxfield v. Sinclair Intern* 766 F.2d 788 (3rd Cir. 1985), *cert. denied,* U.S. , 106 S. Ct. 796 (1986); on the other hand, if the claimant has lost his job due to a reduction-in-force, then he may show this fourth element by varying means, such as showing that the employer retained employees substantially younger than the plaintiff. *Massarsky v. General Motors Corp.*, 706 F.2d 111 (3rd Cir. 1983) *cert. denied,* 464 U.S. 937 (1983). For the purposes of this brief, American does not believe that it is important to focus on reduction-in-force cases, as opposed to non-reduction-in-force cases. Rather, the focus here is the question of whether the favored employee, who either replaced the plaintiff or who was retained instead of the plaintiff, must be within or without the protected group.

out a jury issue in any age discrimination case. The decisions of this Court and the Courts of Appeals make it abundantly clear that the plaintiff's burden will vary from case to case, depending upon the facts presented. This approach has been succinctly stated by the Eighth Circuit:

> "Further, the factually-oriented, case-by-case nature of the ADEA claims requires that we not be overly rigid in our consideration of the evidence of discrimination a plaintiff may offer."

Holley v. Sanyo Mfg., Inc., 771 F.2d at 1166. *See also, Moses v. Falstaff Brewing Corp.*, 550 F.2d 1113, 1114 (8th Cir. 1977).

An examination of the various authorities cited by the petitioners in their petition reveals that the requisite quantum of proof does indeed vary on a case-by-case basis. First, many of the decisions of the Courts of Appeals hold that an ADEA plaintiff may prove the fourth element of a prima facie case, in a reduction-in-force case, or otherwise, by showing that the favored employees were younger than the complainant. However, most of those cases reveal that the evidence must show, at the very least, that the favored employee is *substantially* younger than the plaintiff. For example, the proof in *Thornbrough v. Columbus and Greenville R. Co.*, 760 F.2d 633 (5th Cir. 1985) showed that at least one, if not all three, of the younger, favored employees were outside the protected age group and that all of the alleged favored employees were *substantially* younger than the age discrimination plaintiff. The Fifth Circuit in *Thornbrough* held that the plaintiff proved a prima facie case of discrimination by showing that younger employees were retained in a reduction-in-force (the proof offered by the plaintiff also demonstrated that the younger employees were less qualified than the plaintiff). The *Thornbrough* court also cautioned that the necessary elements of a prima facie employment discrimination case vary depending on

the facts of a particular case. Significantly, the Court below specifically recognized and addressed the holding in *Thornbrough,* but held that the *facts* in this case distinguished it from *Thornbrough. Barber, et al. v. American Airlines, Inc.,* 791 F.2d at 661.

Likewise, the Third Circuit has observed in *Maxfield v. Sinclair Intern.,* 766 F.2d at 792-793 that the age difference between the plaintiff and the so-called favored, younger employee must be substantial:

> "Although replacement by someone younger, without more, will not give rise to an inference of age discrimination, it has been noted that a substantial difference in the ages may be circumstantial evidence that gives rise to that inference."
>
> * * *
>
> "Moreover, we see little basis for any concern that replacement by a slightly younger employee will give rise to an ADEA claim, since proof of replacement by a younger person is not conclusive of discrimination but is merely one element in a set of circumstances that may give rise to an inference of discrimination."

Accord, Loeb v. Textron, Inc., 600 F.2d 1003, 1013 n.9 (1st Cir. 1979).

The Eleventh Circuit has held that the mere fact that one employee is replaced with another who is younger does not, without more, give rise to an inference that age was even considered in the decision to dismiss or demote the first employee. Instead, the Eleventh Circuit has noted that the discrimination prong of the prima facie case *could be* established by showing that a plaintiff was replaced by a *substantially* younger employee with equal or inferior qualifications. *Goldstein v. Manhattan Industries, Inc.,* 758 F.2d 1435, 1443 (11th Cir. 1985) *cert. denied,* U.S. , 106 S. Ct.

525 (1985) (emphasis supplied). *See also, Pace v. Southern Ry. System,* 701 F.2d 1383, 1386 (11th Cir. 1983), *cert. denied,* 464 U.S. 1018 (1983) (no evidence of discrimination when a fifty-one-year-old employee was demoted and replaced by a forty-nine-year-old employee; also holding that the *McDonnell* test is not the sole method of establishing a prima facie test case of age discrimination).

The Third Circuit, in *Massarsky v. General Motors Corp.,* 706 F.2d 111 has held that in a reduction-in-force situation a plaintiff may prove a prima facie case when it is shown that, among other things, the favored employee who was retained was, "considerably younger in age" than the ADEA plaintiff. Likewise, in *Duffy v. Wheeling Pittsburgh Steel Corp.,* 738 F.2d 1393 (3rd Cir. 1984), *cert. denied,* U.S. , 105 S. Ct. 592 (1984) the Court found that the plaintiff had established a prima facie of age discrimination by showing that the alleged favored employee was *significantly* younger than the ADEA plaintiff and by showing that the employer saved a considerable amount of money by laying off the plaintiff, instead of the favored employee.

Other cases holding that there must be a substantial age difference between the ADEA plaintiff and the favored, younger employee are as follows: *Palmer v. U.S.,* 794 F.2d 534 (9th Cir. 1986); *Haskell v. Kaman Corp.,* 743 F.2d 113 (2nd Cir. 1984); *Jackson v. Shell Oil Co.,* 702 F.2d 197 (9th Cir. 1983); *Douglas v. Anderson,* 656 F.2d 528 (9th Cir. 1981); *Schwager v. Sun Oil Co. of Pennsylvania,* 591 F.2d 58 (10th Cir. 1979).

In addition, many courts have held that there must be a showing of not only a substantial age difference between the plaintiff and the favored, younger employee, but also something more. *Palmer v. U.S.,* 794 F.2d at 534 (replacement by a substantially younger employee with equal or inferior qualifications); *Duffy v. Wheeling Pittsburgh Steel Corp.,* 738 F.2d at

1393 (favored employee significantly younger, plus company saved money by laying off the plaintiff and retaining the younger, favored employee); *Douglas v. Anderson,* 565 F.2d at 528 (replacement by a substantially younger employee with equal or inferior qualifications); *Dace v. ACF Industries, Inc.,* 722 F.2d 374 (8th Cir. 1983) (plaintiff replaced by a substantially younger employee, which resulted in a savings of money to the employer); *Coburn v. Pan American World Airways, Inc.,* 711 F.2d 339, 343 (D.C. 1983), *cert. denied,* 464 U.S. 994 (1983) (younger persons were retained and others later promoted). *See also, Thornbrough v. Columbus and Greenville R. Co.,* 760 F.2d at 633 (substantial age difference and younger employees were less qualified than the plaintiff); *Laugesen v. Anacondia Company,* 510 F.2d 307, 313 n.4 (6th Cir. 1975) ("...we do not believe that Congress intended automatic presumptions to apply whenever a worker is replaced by another of a different age.") This trend has been cogently summarized by the Eleventh Circuit:

> "We agree with the tenor of these cases insofar as they establish that replacement by one within the protected category will not preclude proof of a prima facie case. However, in no case does this court hold that as a matter of law a prima facie case is established if a plaintiff simply shows he is in the protected group, was adversely affected by an employment decision, was qualified and was replaced by one younger than himself. In each of these cases not only was the plaintiff replaced by someone younger but there also was other evidence of discrimination based on age. In *Moore* the district court explicitly found that the plaintiff had produced sufficient statistical data of discrimination to preclude summary judgment. That the plaintiff had been replaced by one younger yet still in the protected class was only an additional ground for finding that a prima facie case had been established. In *Spagnuolo,* the Fourth Circuit affirmed a judgment for a ADEA

> plaintiff who had not only shown that he was replaced by someone thirteen years younger but within the protected group but also had presented direct evidence of purposeful discrimination by the defendant. *Spagnuolo v. Whirlpool Corp.*, 641 F.2d at 1113. In *Douglas,* though a directed verdict for the defendant was affirmed, the Ninth Circuit held that the plaintiff had made out a prima facie case. The plaintiff had shown that he was replaced by someone younger than himself, yet within the protected age group, and also had presented 'substantial evidence of satisfactory job performance.' *Douglas v. Anderson*, 656 F.2d at 533. The Ninth Circuit noted that an inference of age discrimination can be established when all other elements of a McDonnell Douglas/Price test are established but, instead of replacement by one outside the protected group, the plaintiff 'was replaced by a substantially younger employee with equal or inferior qualifications.' *Id.,* at 533 (emphasis supplied). The court aptly observed that '[i]f the replacement is only slightly younger than the plaintiff, then it is less likely that an inference of discrimination can be drawn.' *Id.* In *Douglas,* the replacement was only five years younger than the plaintiff but the substantial evidence of qualifications of the plaintiff served to heft the plaintiff over the line between failure and success in establishing a prima facie case. A prima facie case may be established only when there is a basis for inferring that discrimination is the reason for the employment decision and in none of the cases discussed was the fact that the replacement was younger than the plaintiff enough, standing alone, to give rise to that inference."

Pace v. Southern Ry. System, 701 F.2d at 1390.

At page 10 of their petition, the petitioners represent to this Court that the Fourth and Seventh Circuit Courts of Appeals are in conflict with the other circuits by holding that an ADEA

plaintiff must show that the favored employee is outside the protected age group.[4] This representation is fallacious. First, the statement by the Fourth Circuit in *E.E.O.C. v. Western Elec. Co., Inc.* 713 F.2d 1011 (4th Cir. 1983) that it was incumbent upon the EEOC to prove that, upon the claimants' demotions, persons outside the protected age class were retained is merely dicta and is not necessary to the holding of the case, which was that the plaintiff failed to rebut the employer's legitimate nondiscriminatory business reasons for its actions. Moreover, in *Western Electric* the Fourth Circuit recognizes that an ADEA plaintiff could make out a case of discrimination by producing "other evidence that [the employer] did not treat age neutrally in its demotion selections." *Id.*, at 1011. Additionally, the test articulated by the Fourth Circuit in its dicta in the foregoing case is merely one, but not the only, method of proving a prima facie case. *McCuen v. Home Ins. Co.*, 633 F.2d 1150, 1151 (5th Cir. 1981); *Douglas v. Anderson*, 656 F.2d at 532; *Maxfield v. Sinclair Intern.*, 766 F.2d at 792 n.1; *see also, McCorstin v. U.S. Steel Corp.*, 621 F.2d at 753. More telling, the petitioners have failed to inform this Court that the Fourth Circuit has recognized that an ADEA plaintiff may prove age discrimination when the younger, favored employee was within the protected group. *Spagnuolo v. Whirlpool Corp.*, 641 F.2d 1109 (4th Cir. 1981), *cert. denied*, 454 U.S. 860 (1981); *Lovelace v. Sherwin-Williams Co.*, 681 F.2d 230, 242 n.3 (4th Cir. 1982).

The petitioners have also flatly misstated the holdings of the Seventh Circuit in *Trembath v. St. Regis Paper Co.*, 753 F.2d

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[4] The petitioners also claim that the opinion below is in conflict with two earlier Eighth Circuit cases — *Tribble v. Westinghouse Elec. Corp.*, 669 F.2d 1193 (8th Cir. 1982), *cert. denied*, 460 U.S. 1080 (1983); and *Cova v. Coca-Coca Bottling Co.*, 574 F.2d 958 (8th Cir. 1978). American believes that the foregoing discussion amply refutes this assertion.

603 (7th Cir. 1985) and *Tice v. Lampert Yards, Inc.*, 761 F.2d 1210 (7th Cir. 1985). In *Trembath,* the entire focus of the Court's opinion was that the plaintiff failed to prove a prima facie case because he did not establish that there was an available job open for which he applied at the time he was terminated. In *Tice,* the Seventh Circuit did not hold that the ADEA plaintiff must show that he was replaced by an employee outside the protected group; rather, the sole issue before the Court was whether the plaintiff was replaced by a younger employee. Once again, the petitioners fail to cite other Seventh Circuit authority that clearly holds that a plaintiff may raise an inference of age discrimination by showing that the younger, favored employee was within the protected age group, but that the younger, favored employee must be substantially younger than the plaintiff. *La Montagne v. American Convenience Products, Inc.,*750 F.2d 1405 (7th Cir. 1984); *Stumph v. Thomas & Skinner, Inc.,* 770 F.2d 93 (7th Cir. 1985).

The foregoing authorities make it abundantly clear that whether dealing with a reduction-in-force case or a non-reduction-in-force case, in order to create an inference of discrimination or a fact issue of discrimination, the ADEA plaintiff may do so by producing evidence of, among other things, favorable treatment of a *substantially* younger employee. The decision of the Court below is in accord with the foregoing decisions, as it found that the alleged favored employees were substantially the same age as the petitioners.

Moreover, the foregoing authorities do not set forth the only means by which a plaintiff may make out a prima facie case of age discrimination. A plaintiff may also prove a prima facie case by production of evidence, circumstantial or direct, from which the fact finder might reasonably conclude that the employer intended to discriminate on the basis of age. *Holley v. Sanyo Mfg., Inc.,* 771 F.2d at 1166; *Williams v. General Motors Corp.,* 656 F.2d 120 (5th Cir. 1981) *cert. denied,* 455 U.S. 943

(1982); *LaGrant v. Gulf & Western Mfg. Co., Inc.*, 748 F.2d 1087, 1090-1091 (6th Cir. 1984) (plaintiff may establish a prima facie case of discrimination by producing evidence that his age was a factor in his termination); *McCorstin v. U.S. Steel Corp.*, 621 F.2d at 754 (evidence of a pattern of terminating older workers allows an inference that age played a role in [complainant's] discharge); *see also, Goldstein v. Manhattan Industries, Inc.*, 758 F.2d at 1443 (whether a prima facie case has been shown in any given situation is essentially a factual question). The reasons for these varied approaches to ADEA cases is found in the legislative history of the Act:

> "The case-by-case basis should serve as the underlying rule in the administration of the legislation. Too many different types of situations in employment occur for the strict application of general prohibitions and provisions."

H.R. Rep. No. 805, 90th Cong., 1st Sess. (1967); Reprinted [1967] U.S. Code Cong. & Ad. News (92 Stat.) 213, 220.

Inasmuch as the ADEA is factually oriented, many cases must stand or fall on their own facts. It is exactly this factually oriented, case-by-case analysis that was at work in the decision below.[5] As set forth above, the petitioners now focus on one event as providing evidence for discrimination, and that is the episode in which younger employees within the protected age group were retained by American at Little Rock. The ages of those employees ranged from forty-five to forty-eight, while the ages of the petitioners were forty-nine, fifty-one and fifty-eight at the time they were reduced in force. At first glance, one may question (although the petitioners do not do so) whether or not

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[5] It should also be borne in mind that the Court below did not hold that the petitioners failed to prove a prima facie case of discrimination, but rather, it studied the record as a whole, with a view of determining whether the evidence was legally sufficient to support the jury's findings in favor of the petitioners. *Barber, et al. v. American Airlines, Inc.*, 791 F.2d at 659-660.

an age difference of forty-five (the age of the youngest allegedly favored employee) versus fifty-eight (the age of the oldest petitioner) raises such a substantial difference in age so as to constitute evidence of age discrimination. However, an examination of the facts in this case reveals that it does not. The opinion of the Eighth Circuit makes it clear that the alleged favored employee who would have been "bumped" first and thus required to leave Little Rock was Jim Hicks, who was forty-eight years old, almost the same age as the petitioner Tarter. *Barber, et al. v. American Airlines, Inc.,* 791 F.2d at 660. It was not American that picked the order in which the so-called favored employees would have been bumped; but rather, it was a seniority system to which petitioners make no challenge.

Moreover, there are other facts in the record that are most significant with reference to the so-called younger, favored employees. First, after the petitioners were reduced in force at Little Rock in 1983, there were only seven full-time agent positions in all classifications remaining in Little Rock, with those positions being in freight, the airport ticket office, the city ticket office, and vacation relief (App. 666-668). Included in those seven agents were the three alleged favored agents. All seven agents were high in seniority and received the same salaries as the petitioners (App. 683), with the exception of one of the seven agents who received between four to seven cents an hour less than the others (App. 68 -684). No matter which agents remained in or left Little Rock, American would have saved no money, except for the four to seven cents an hour with reference to the one remaining agent.[6] Thus, this evidence

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[6] On a forty-hour week, this would have amounted to a yearly savings of between $83.20 to $145.60; however, American would have experienced a net loss because it was obligated to (and did, in Tarter's case) pay moving expenses, plus a $12,500 moving bonus in Mr. Tarter's case (App. 426, Plaintiff's Exhibit 13).

removes the considerations at work in *Duffy v. Wheeling Pittsburgh Steel Corp.,* 738 F.2d at 1393 and in *Dace v. ACF Industries, Inc.,* 722 F.2d at 374, wherein the employer saved money by favoring the younger employee. Likewise, there is absolutely no dispute that the alleged younger, favored employees who remained in Little Rock after the reduction in force in 1983 were fully qualified, efficient, capable agents in January of 1983 (App. 308, 430). These facts negate the possibility that the younger, favored employees had qualifications that were equal or inferior to those of the petitioners. *See, Palmer v. U.S.,* 794 F.2d at 534; *Thornbrough v. Columbus and Greenville R. Co.,* 760 F.2d at 642; and *Douglas v. Anderson,* 656 F.2d at 528. This is especially true in light of the petitioners' admissions that they would have needed training in order to become fully qualified in January of 1983, in order to become efficient ticket agents, the job into which they wished to "bump," thereby replacing the incumbents in those positions. (App. 280-282, 299, 301, 372, 374, 380-381, 414, 502-522).

In sum, the real holding of the Eighth Circuit was that in light of the evidence presented to it, there was no legally sufficient evidence to support the jury's finding that the petitioners' age was a determining factor with reference to any employment action American took towards the petitioners:

> "In reviewing a judgment entered on the verdict of a jury, we are mindful that we must view the evidence in the light most favorable to the party winning the verdict, here plaintiffs, according them the benefit of every reasonable inference that can be drawn from the evidence, and setting aside the verdict only if the evidence points all one way. *Dace, supra,* 722 F.2d at 375-76. We have carefully read every page of the testimony at this trial, and we are persuaded that this stringent standard has been met. The jury could rationally have believed that plaintiffs ought in good conscience to have been permitted to stay in Little

> Rock, and that American had violated its own personnel practices in demanding their transfer, but there is absolutely no substantial evidence in this record that would justify attributing American's actions to plaintiffs' age."

Barber, et al. v. American Airlines, Inc., 791 F.2d at 660-661.

The foregoing shows that there is simply no conflict between the various Courts of Appeals as to the standard of proof required of an ADEA plaintiff. Indeed, the circuits recognize, as does this Court, that the standard will vary with the factual setting; and they recognize that the favored employee can be within or outside the protected age group. They also recognize that there must be, at the very least, a substantial age difference between the claimant and the favored employee, if not also other evidence of discrimination based on age. The Court below held that based upon its review of the record, which revealed that the alleged favored employees were substantially the same age as the petitioners, "there is absolutely no substantial evidence in this record that would justify attributing American's actions to plaintiffs' age." *Id.,* at 661. Thus, the petitioners are actually asking this Court to review the entire record below and to make its independent determination as to whether or not there is legally sufficient evidence to support the jury's finding. However, that simply is not the function of this Court. *General Talking Pictures Corp. v. Western Electric Co.,* 304 U.S. 175 (1938) (granting of a writ would not be warranted merely to review the evidence or inferences drawn from it); *United States v. Johnston,* 268 U.S. 220 (1925).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Counsel for Respondent

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

NO. 86-333

JIM BARBER, DAVID TARTER, and
RAYMOND BRADLEY,

Petitioners,

v.

AMERICAN AIRLINES, INC.,

Respondent.

CERTIFICATE OF SERVICE

I Thomas L. Case, a member of the Bar of this Court, hereby certify that on this 19th day of September, 1986, three copies of the Brief in Opposition of Respondent, American Airlines, Inc., in the above-entitled case were mailed, first class postage prepaid, certified mail return receipt requested, to Mr. Philip Kaplan, Kaplan, Brewer & Miller, P.A., Metro Centre Mall, 415 Main Street, Little Rock, Arkansas 72201, counsel for the Petitioners. I further certify that all parties required to be served have been served.

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No. 86-333

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JIM BARBER, DAVID TARTER, and RAYMOND BRADLEY,
Petitioners,

vs.

AMERICAN AIRLINES, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals
For the Eighth Circuit

REPLY BRIEF

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QUESTIONS PRESENTED

Whether a plaintiff in an ADEA reduction-in-force case need only demonstrate as part of his prima facie case that the employer favored younger employees, or whether the plaintiff is required to demonstrate that the favored employees were outside the protected age group.

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For the Eighth Circuit

REPLY BRIEF

OPINIONS BELOW

The judgment of the district court entered on the jury verdict, dated December 31, 1984, and the Memorandum Opinion and Order of the District Court, dated March 18, 1985, are included in the Appendix to the Petition at pages A-1 and A-5. The opinion of the United States Court of Appeals for the Eighth Circuit, reversing the decision of the district court, entered May 28, 1986, and the supplemental decision denying the petitioner's petition for rehearing *en banc,* are also set out in the Appendix to the Petition at pages A-8 and A-14. The opinion of the United States Court of Appeals for the Eighth Circuit has recently been reported as *Barber v. American Airlines, Inc.*, 791 F.2d 658 (8th Cir. 1986).

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The Age Discrimination in Employment Act (ADEA) of 1967, 29 U.S.C. §621, *et. seq.*, provides, in pertinent part:

> Section 4 [29 U.S.C. §623] (a) It shall be unlawful for an employer...(1) to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.

Section 12, 29 U.S.C. §631 (a) provides:

> The prohibitions in this Act shall be limited to individuals who are at least 40 years of age but less than 70 years of age.

STATEMENT OF THE CASE

Petitioners reaffirm their original Statement of the Case.

ARGUMENT IN REPLY

1. The respondent argues that the Eighth Circuit's opinion is not based on the legal premise that a plaintiff in an ADEA case must demonstrate that the employer favored employees outside the protected age group in order to prove a prima facie case of discrimination. The respondent, quite simply, is wrong, as the pertinent passages of the Eighth Circuit's opinion, quoted in full, demonstrate:

> *But here, plaintiffs' theory—that others were permitted to "bump" in the past in a similar situation—contains the seeds of its own refutation. For the other employees who were allegedly given the privilege that plaintiffs now claim were also within the protected age group and, in fact, were reasonably close in age to the plaintiffs themselves.*
>
> ---
>
> *But again, no inference of age discrimination can rationally be drawn, because the employees whom American chose to retain in Little Rock, the ticket agents whom plaintiffs wished to "bump," were also in the same general age bracket as plaintiffs. Not a single one of them was outside the protected age group, and Jim Hicks, the person who would have been "bumped" first, was 48 years old, almost the same age as the plaintiff Tarter.*

2. The respondent claims that there is no dispute in the circuits regarding the burden of proof in ADEA suits, stating that "the plaintiffs' burden will vary from case to case, depending on the facts presented," and that the *McDonnell Douglas* guidelines are not "the alpha and omega of possible tests in the age discrimination context." (Brief of Respondent, p. 6) Respondent's argument overlooks decisions in every circuit adopting the *McDonnell Douglas* framework to ADEA cases. Further, it misreads the holdings in several circuits which adopt the fourth element of the *McDonnell Douglas* test as "proof of

favored treatment toward *younger* employees." *See, Goldstein v. Manhattan Industries, Inc.*, 758 F.2d 1435 (11th Cir. 1985); *Loeb v. Textron*, 600 F.2d 1003 (1st Cir. 1979); *Maxfield v. Sinclair International*, 766 F.2d 788 (3d Cir. 1985); *Coburn v. Pan American World Airways, Inc.*, 711 F.2d 339 (D.C. Cir. 1983).

3. Contrary to respondent's argument, the Fourth Circuit, in *EEOC v. Western Electric Co.*, 713 F.2d 1011 (4th Cir. 1983), has quite clearly held that proof of age discrimination requires proof of favored treatment of employees outside the protected age group, a position in conflict with other circuits but consistent with the Eighth Circuit's holding in this case. This position is cast unambiguously in the following passage from *Western Electric:*

> [B]efore requiring Western to produce evidence of legitimate business reasons for the demotion selections, the district court should have required the EEOC either to show that, upon the claimant's demotions, persons outside the protected age class were retained in the same positions, or to produce some other evidence that Western did not treat age neutrally in its demotion selections.

Id. at 1015.

4. During 1985 and 1986, the appellate courts, in reviewing ADEA appeals on the issue of sufficiency of evidence, have reversed a significant number of jury verdicts and have upheld district court judgments N.O.V. and directed verdicts in favor of the defendant. Forty-five percent (45%) of the cases appealed on such grounds fall into these categories, and the phenomenon reflects a pattern on the part of the courts of appeals to erode the right of the ADEA plaintiff to a trial by jury.

5. It is settled that in reviewing a judgment entered on a jury verdict, a court must view the evidence in the light most favorable to the party winning the verdict. The recent number

of appellate reversals of jury verdicts implicates the Seventh Amendment and is a valid basis for review by this Court. In *Galloway v. United States,* 319 U.S. 372 (1943), this Court made clear its displeasure with appellate de novo examinations of evidence presented to a jury. This position has been steadfastly affirmed in subsequent decisions. *See, Colgrove v. Battin,* 413 U.S. 149(1973); *Parklane Hosiery Co. v. Shore,* 439 U.S. 322 (1979).

6. Appended to this brief and labeled Appendices A and B are tables of decisions by the circuit courts involving ADEA jury verdicts. Appendix A contains a list of 29 decisions, all reported ADEA decisions by Courts of Appeals for 1985 and 1986, involving the issue of sufficiency of evidence to support the ADEA claim. Appendix B contains those decisions from Appendix A which are reversals of jury verdicts, affirmances of directed verdicts, or affirmances of judgments notwithstanding the verdict for the defendants.

7. These decisions, including the case at bar, implicate the Seventh Amendment and mandate a review by this Court.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari to the Eighth Circuit Court of Appeals should be granted. The Eighth Circuit's decision is in conflict with the decisions of several circuits and the number of appellate court reversals of jury verdicts implicates the Seventh Amendment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Karen L. Arndt, hereby state on oath that a copy of the above and foregoing document has been mailed on this 6th day of October, 1986, to opposing counsel.

KAREN L. ARNDT

APPENDIX

APPENDIX A

Hornsby v. Conoco, Inc., 777 F.2d 243 (5th Cir. 1985)

Barber v. American Airlines, Inc., 791 F.2d 658 (8th Cir. 1986)

Bell v. Gas Service Co., 778 F.2d 512 (8th Cir. 1985)

Stacey v. Allied Stores Corp., 768 F.2d 402 (D.C. Cir. 1985)

Taylor v. Home Insurance Co., 777 F.2d 849 (4th Cir. 1985)

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Ridenour v. Lawson Co., 791 F.2d 52 (6th Cir. 1986)

Christie v. Foremost Ins. Co., 785 F.2d 584 (7th Cir. 1986)

Sherrod v. Sears, Roebuck & Co., 785 F.2d 1312 (5th Cir. 1985)

Merkel v. Scovill, Inc., 787 F.2d 174 (6th Cir. 1986)

Berndt v. Kaiser Aluminum & Chemical Sales, Inc., 789 F.2d 253 (3rd Cir. 1986)

Johnson v. University of Wisconsin - Milwaukee, 783 F.2d 59 (7th Cir. 1986)

Pruet Production Co. v. Ayles, 784 F.2d 1275 (5th Cir. 1986)

APPENDIX B

Barber v. American Airlines, Inc., 791 F.2d 658 (8th Cir. 1986) (reversed jury verdict)

Bell v. Gas Service Co., 778 F.2d 512 (8th Cir. 1985) (reversed jury verdict)

Bristow v. Daily Press, Inc., 770 F.2d 1251 (4th Cir. 1985) (reversal jury verdict)

Christensen v. Equitble Life Assurance Society of the United States, 767 F.2d 340 (7th Cir. 1985) (reversed jury verdict)

Holley v. Sanyo Mfg., Inc., 771 F.2d 1161 (8th Cir. 1985) (reversed jury verdict)

Merkel v. Scovill, Inc., 787 F.2d 174 (6th Cir. 1986) (reversed jury verdict for two plaintiffs)

Ridenour v. Lawson Co., 791 F.2d 52 (6th Cir. 1986) (reversed jury verdict)

Sherrod v. Sears, Roebuck & Co., 785 F.2d 1312 (5th Cir. 1985) (reversed jury verdict)

Wilkins v. Eaton Corp., 797 F.2d 342 (6th Cir. 1986) (reversed jury verdict)

Tice v. Lampert Yards, Inc., 761 F.2d 1210 (7th Cir. 1985) (judgment notwithstanding the verdict affirmed)

Gray v. New England Tel. & Tel. Co., 792 F.2d 251 (1st Cir. 1986) (directed verdict for defendant affirmed)

Hornsby v. Conoco, Inc., 777 F.2d 243 (5th Cir. 1985) (directed verdict for defendant affirmed)

Pruet Production Co. v. Ayles, 784 F.2d 1275 (5th Cir. 1986) (directed verdict for defendant affirmed)